* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : July 12, 2007
Date of decision : September 11, 2007

\+ CRL.REV. P 156/2007

VIKAS CHUDHARY ..... Petitioner
Through Mr. G.K. Kaushik, Advocate

versus

STATE ..... Respondent
Through Mr. Pawan Sharma, APP for State
Mr. Subhash Bhuttan for complainant

CORAM:
Mr. Justice S. Ravindra Bhat

1. Whether reporters of local papers may be allowed to see the judgment.? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

Mr. Justice S. Ravindra Bhat:

1. The present revision petition is preferred against the impugned order dated 20.01.2007 passed by the learned Additional Sessions Judge (ASJ). The Petitioner is charged for committing offences under sections 302/364/34 of the Indian Penal Code.

2. The brief facts necessary to decide this present petition are as follows:

A complainant was lodged a complaint on 18.1.2003 that the 20 year old son, of the complainant who had gone out with his friends was missing. The next day i.e. on 19.1.2003 the Petitioner was suspected of involvement by the Police and detained for 2-3 days. On the basis of investigation the petitioner was charged for the murder.

3. During the trial the Petitioner moved an application for transfer of his case to the Juvenile justice Board on the plea that he was a juvenile at the time of alleged commission of the offence. The court directed the investigating officer to verify the Secondary School Certificate of the petitioner and file a report. Later the Court directed the Investigating Officer to have the Petitioner's age determined by "a Bone ge test" as well as an X-ray. The Investigating officer filed the report of Dr. P.K.Jain, Senior Radiologist, who was of the opinion that the Petitioner was allegedly 22-25 years old on the date of the test. The test was held on 09.08.2005.

4. The trial court by its order dated 20.01.2007 held that the Petitioner was 19 years at the time of occurrence of the incident. The extracts of the order are as follows;

> "*according to the conviction slip dated 4.5.2003, of the accused, which was filled on the basis of the information given by the accused, the age of the accused has been mentioned as 19 years and even after calculation, he was more than 18 years of age on the date of the alleged offence.*
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> *Accordingly, in my opinion, accused was more than 18 years of age on the date of alleged offence dated 18.01.2003."*

5. Sh. G.K.Kaushik argued that the trial court wrongly concluded that on the date of the incident the petitioner was 19 years and 5 months old. The bone x-Ray report says that on the date of the medical examination the petitioner was between 22-25 years old. *L*earned counsel submitted that the ossification test is not a fool proof test to establish age. It is a well settled principle of law that while interpreting the law regarding age of an individual, that mode which favours and is beneficial to the delinquent should be adopted. The age on the lower side should be taken into account and the difference between the date of occurrence and date of examination is to be deducted from the age on the lower side and a further period of 2-3 years

as margin of error is deducted which clearly makes the Petitioner a juvenile as his age works out to less than 18 years on the date of the incident.

6. The learned counsel urged that the petitioner was not given a copy of the bone age X-Ray report; he was also denied an opportunity to examine the doctor to test the veracity and correctness of the report. The Counsel further submitted that the Petitioner belongs to the State of U.P where ossification takes place early in comparison to other parts of India and such ossification depends on the socio-economic conditions. The learned counsel submitted that the Petitioner had filed a copy of his Secondary school certificate, which recorded his correct date of birth as 18.01.1985

7. Learned Counsel for the complainant argued that no birth certificate was available in support of the date of birth of the Petitioner in the school record. The bone age X-ray was conducted to determine the age of the Petitioner. According to the report the age on the date of examination was between 22-25 years and according to calculations, the age of the accused on the date of the incident would be 19 years 5 months. The doctor who conducted the bone X-ray test opined that the age of the accused was more than 20 years and less than 25 years.

8. The learned counsel for the complainant placed reliance on principles of medical jurisprudence to state that an accurate opinion about the age of an individual, especially in earlier years can be formed on examination of the teeth, height and weight, ossification of bones and minor signs. The method of estimating age is to calculate the approximate age after considering physical characteristics, secondary sex characteristics and ossification tests and after allowing a margin in error of 6 months on either side. Thus, if the sum total of all these tests seem to indicate that the age is between fifteen and sixteen, a margin of error of six months on either side would make, according to the recommended method, an estimated age of between 14 ½ to 16 ½ years.

9. This court had, on an earlier occasion remanded the matter for reconsideration, to the learned Additional Sessions Judge. Each factor i.e. the opinion of the senior radiologist, the date of birth recorded in the CBSE certificate, and relevant facts were noticed in the course of the earlier order (dated 31.08.2006 in Cr. Rev. P.751/2005) . This court remanded the matter for reconsideration, after holding as follows :

> *"On going through the aforesaid order, it is apparent that the learned Additional Sessions Judge did not give any weightage whatsoever to the School Certificate concerning the age of the present petitioner and relied entirely on the age determined as per the X-Ray report which indicated the age of the Petitioner on the date of the incident as around 19 years and five months. However, this is an estimation at best. Moreover, the learned counsel for the petitioner submits that even the usual benefit of plus and minus two years was not considered by the Court below.*
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> *Anyhow, these are the matters which require a more detailed examination particularly in view of the fact that there exists a School Certificate wherein the date of birth of the petitioner has been given. The veracity of the School Certificate and Transfer Certificate submitted by the petitioner is not doubted. In the circumstances, the impugned order is set aside and the learned Additional Sessions Judge is directed to consider the matter afresh and if it appears to the learned Additional Sessions Judge that the petitioner is a Juvenile on the basis of the material on record, he is required to be sent to the Juvenile Justice Board for further proceedings. "*

10. A reading of the impugned order would show that though the School certificate on record was admitted the learned ASJ discarded it as of no consequence after citing judgments to the effect that in the absence of supporting materials in the School records, such certificates virtually have no value. He thereafter proceeded to conclude as follows :

> *"After committing the crime of murder of four innocent persons, the petitioner cannot be permitted to resort to adopt means*

and tactics or to take measures which, if accepted or condoned, may result in the murder of the judicial system itself. The efforts made by the accused by way of this petition, are not likely to advance the interests of justice, but on the contrary frustrate it.

In view of the above settled proposition of law, it is clear that the judgment Pratap Singh Vs. State of Jharkhand and another, (2005) 3 Supreme Court Cases 551, of Hon'ble Supreme Court of India was not referred before the Hon'ble High Court of Delhi in the judgment Manjeet Vs. State, 2006 (3) JCC 1630 on which the learned defence counsel for the accused Vikas Choudary has relied upon. From the judgments cited by the learned APP, it is clear that to ascertain the age of accused person only School Leaving Certificate can not be relied upon alone and the court has to see all the other facts and circumstances alongwith the other material placed on record. If assuming that the age of accused was 22 years on the date of his examination as per Bone Age X-ray Examination report, after giving margin of two years from the age reported upto 25 years, even then on the date of alleged offence, he was more than 18 years of age.

According to the conviction slip dated 04.05.2003, of the accused, which was filled on the basis of the informations given by the accused, the age of the accused has been mentioned as 19 years and even after calculation, he was more than 18 years of age on the date of alleged offence."

11. The incident alleged in this case occurred in January 2003; the Petitioner was examined by the medical expert on 9-8-2005. He clearly stated that at that time, the Petitioner appeared to be 22-25 years. Reliance was placed on a certificate – issued by the Board, in 1999, recording the Petitioner's date of birth to be 18-1-1985.

12. While remitting the matter for reconsideration this Court had categorically recorded that there was no dispute about the genuineness of the certificate. In these circumstances, the approach of the learned Additional Sessions Judge, in rejecting it on the ground that the previous judgment of this Court in *Manjit's* case was inapplicable, cannot be sustained. While it may be that the said judgment did not refer to the decision of the Supreme Court in *Pratap Singh vs. State of Jharkhand* 2005 (3)

SCC 551, yet the Court was under an obligation to see the effect of an undisputed document and the attendant circumstances. Those attendant circumstances are:-

(1) The certificate having been issued in 1999;

(2) It being an undisputed one, and recording the Petitioner's date of birth as 18.1.1985;

(3) The medical expert stating in August, 2005 that the petitioner appeared to be 22-25 years of age.

13. A proper analysis of the facts in this case would reveal that the Additional Sessions Judge not only misdirected himself but appears to have taken upon himself the role of sitting in judgment over this Court's direction. The Supreme Court did indicate in the judgment in *Pratap Singh's* case (supra) that by virtue of Section 35 of the Evidence Act, certificates issued without primary material are not binding. Such a proposition, however cannot rule out the relevant of a document, specially based on the probabilities. No one has denied that the petitioner was issued the certificate in 1999; the only objection to it was that the school did not appear to have any supporting material by way of a birth certificate etc. The value of the certificate i.e its having been issued, admittedly much before the incident and its genuineness, have some significance; the document, therefore, could not have been lightly discarded. There was no reason for the petitioner to have anticipated an event 4 years earlier, and provided for it.

14. The approach of the learned Additional Sessions Judge also appears to have been coloured by the facts alleged as appears from the first paragraph extracted in Para 10 above. If an accused asserts that he is a juvenile and applies for appropriate adjudication that he is a juvenile that cannot be termed as resort to tactics or to take measures, if accepted or “may result in the murder of judicial system itself”. Regretably this entirely avoidable and injudicious approach coloured the learned

Additional Sessions Judge's view; he did not decide the application in its proper perspective.

15. as far as the ossification test and the medical evidence is concerned there too the approach of the learned Additional Sessions Judge is in my opinion, erroneous. According to the expert the petitioner was 22-25 years on the date of his examination i.e 9.8.2005. The Learned Additional Sessions Judge acknowledged that such determination is a rough estimate and the individual would have to be given benefit by deducting some years but proceeded to do so from the outer age indicated. This is an incorrect approach as the juvenile is entitled to beneficial interpretation in such case. Therefore, the two years deduction made would have to be from the lower age indicated namely, 22 years. That would mean that as in August, 2005 the Petitioner was probably 20 years; as on the date of incident, (20.01.2003) in all probability he was less than 18 years. This interpretation is also in consonance with the claims based on the Board Certificate relied upon by the Petitioner.

16. In view of the above conclusions the Petition has to succeed. The matter is remitted to the Additional Sessions Judge for further proceedings towards separation of the trial of the Petitioner-Juvenile, in accordance with law.

17. The Petition is allowed in the above terms. Order dasti.

No costs.

September 11,2007 (S. RAVINDRA BHAT)

JUDGE